Supreme Court, U.S.
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No. 05-1574

In the Supreme Court of the United States

IGNACIO SERGIO ACOSTA,

Petitioner,

v.

THE STATE OF TEXAS

Respondent.

On Petition for a Writ of Certiorari to the Court of Appeals, Eighth District of Texas, El Paso, Texas

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED
(Restated)

1. Does a state proscription on the sale of obscene devices, namely, dildos, that also provides an "affirmative defense" to individuals that promote such obscene devices for "a bona fide medical, psychiatric, judicial, legislative, or law enforcement purpose" (quoting TEX PENAL CODE ANN. § 43.23(g)), and does not in any way criminalize the use of such devices, violate substantive due process?

2. Does the federal constitution recognize a fundamental right to privately utilize a dildo that extends to the public purchase of such an obscene device?

3. If the federal constitution recognizes a fundamental right to sexual privacy, or in the alternative, simply a right to sexual privacy, is such right subject to state regulation?

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III. Because this Court's recent decision in *Lawrence v. Texas*, 539 U.S. 558, 123 S.Ct. 2472, 156 L.Ed.2d 508 (2003), did not find a fundamental right to privacy, to sexual privacy, or to use sexual devices or obtain access thereto, nor did the case extend the general right to privacy to commercial obscenity transactions outside of the home,

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OPINION BELOW

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CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. CONST. amend. IX

> The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the People.

U.S. CONST. amend. XIV, sec. 1

> . . . No State shall . . . deprive any person of life, liberty, or property, without due process of law . . .

TEX. PENAL CODE ANN. § 43.23(c)(1), (g) (Vernon 2005)

> (c) A person commits an offense if, knowing its content and character, he:
>
> > (1) promotes or possesses with intent to promote any obscene material or obscene device . .
>
> (g) It is an affirmative defense to prosecution under this section that the person who possesses or promotes material or a device proscribed by this section does so for a bona fide medical,

> psychiatric, judicial, legislative, or law enforcement purpose.

TEX. PENAL CODE ANN. § 43.21(a)(5) (Vernon 2005)

> "Promote" means to manufacture, issue, sell, give, provide, lend, mail, deliver, transfer, transmit, publish, distribute, circulate, disseminate, present, exhibit, or advertise, or to offer or agree to do the same.

TEX. PENAL CODE ANN. § 43.21(a)(7) (Vernon 2005)

> "Obscene Device" means a device including a dildo or artificial vagina, designed or marketed as useful primarily for the stimulation of human genital organs.

INTRODUCTION

Review on a petition of certiorari is not a matter of right, but of judicial discretion. *See* Rule 10 of the Rules of the United States Supreme Court. A petition for certiorari will only be granted for compelling reasons. *Id.* Petitioner fails to offer any compelling reason why this Court should grant his petition.

Petitioner seeks review in this Court of the Texas Court of Appeals' determination concerning the constitutionality of a statute that prohibits the sale, not the use, of obscene devices, namely, dildos. But this Court recently denied a petition for writ of certiorari that was submitted on identical grounds as are presented here. *See Williams v. Att'y Gen. of Ala.*, 378 F.3d 1232 (11th Cir. 2004), *cert. denied*, *Williams v. King*, 543 U.S. 1152, 125 S.Ct. 1335, 161 L.Ed.2d 115 (2005). And in any case, there is no fundamental right to sexual

privacy, or a right to sexual privacy that extends to commercial activity. Nor is there a split among the state courts concerning the validity of anti-dildo statutes. Indeed, the law is well-settled that a state may regulate the commerce of obscene sexual devices. Accordingly, the petitioner has failed to offer any compelling reason why this Court should grant review in this case.

In light of the foregoing, and as more fully set forth below, this Court should deny the petitioner's petition for certiorari in its entirety.

ARGUMENT

I. The petitioner's petition for writ of certiorari should be denied because this Court declined to grant a petition for writ of certiorari submitted on identical grounds.

In 2005, this Court denied a petition for writ of certiorari submitted on identical grounds as are presented by the petitioner here. Specifically, the issue presented in that case was whether a state's proscription on the sale, not the use, of dildos, which also exempted such sales for bona fide medical purposes, violated the right to privacy. *See* Petition for Writ of Certiorari, p. i, and Brief in Opposition, p. i, in *Williams*, 378 F.3d 1232, *cert. denied*, *Williams v. King*, 543 U.S. 1152.

Similarly, in this case, the petitioner asserts that the statute at issue, which proscribes the sale, not the use, of obscene devices but provides an affirmative defense to the prosecution under the statute for those that promote such devices for bona fide medical and psychiatric treatment purposes, violates the right to privacy. TEX. PENAL CODE ANN. § 43.23(c)(1), (g). Because the issues raised in both cases are identical, this

Court, as in *Williams*, should deny the petitioner's petition for writ of certiorari.

II. Because there is no fundamental right to sexual privacy or to use a dildo, and in any case, because it is well-settled that a state may regulate obscene devices in commerce, the petitioner's petition for writ of certiorari should be denied.

Texas Penal Code § 43.23(c)(1) declares it an offense for a person to promote or possess with intent to promote any obscene material or obscene device. TEX. PENAL CODE ANN. § 43.23(c)(1). An "obscene device" is defined as "a device including a dildo or artificial vagina, designed or marketed as useful primarily for the stimulation of human genital organs." TEX. PENAL CODE ANN. § 43.21(a)(7). The petitioner alleges that the statute violates the fundamental right to sexual privacy that extends to the purchase of dildos. But this Court has never found a fundamental right to sexual privacy, nor that the right to use obscene materials in the home extends to the sale and purchase thereof. Rather, this Court has consistently held that a state may regulate the commerce of obscene devices, and since the statute at issue only regulates the commercial distribution of such devices and does not prohibit the individual use thereof, the petition for writ of certiorari should not be granted.

A. There is no fundamental right to sexual privacy.

This Court has never held that there is a generalized, fundamental right to sexual privacy emanating from the right

to privacy.[1] Although this Court has been presented with numerous opportunities to identify a fundamental right to sexual privacy, it has invariably declined. *See, e.g., Carey v. Population Servs. Int'l,* 431 U.S. 678, 688 n. 5, 97 S.Ct. 2010, 52 L.Ed.2d 675 (1977) (noting that the Court "has not definitively answered the difficult question whether and to what extent the Constitution prohibits state statutes regulating private consensual sexual behavior among adults, and we do not purport to answer that question now") (internal citations

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[1] Although the United States Constitution does not explicitly mention a right to privacy, this Court has nonetheless interpreted the Constitution to include a right to privacy under substantive due process. *See Griswold v. Connecticut*, 381 U.S. 479, 485, 85 S.Ct. 1678, 14 L.Ed.2d 510 (1965) (deriving the right to privacy from the penumbras emanating from several constitutional provisions); *see also* U.S. CONST. amend XIV; TEX. CONST. art. I, § 19. However, this Court has never held that the right to privacy is fundamental. *See Williams*, 378 F.3d at 1235, *citing Washington v. Glucksberg*, 521 U.S. 702, 725, 117 S.Ct. 2258, 138 L.Ed.2d 772 (1997). Rather, certain fundamental rights emanate from the right to privacy. *See Meyer v. Nebraska*, 262 U.S. 390, 43 S.Ct. 625, 67 L.Ed. 1042 (1923); *Pierce v. Society of Sisters*, 268 U.S. 510, 45 S.Ct. 571, 69 L.Ed. 1070 (1925) (right to direct the education and upbringing of one's children); *see also Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535, 62 S.Ct. 1110, 86 L.Ed. 1655 (1942) (right to beget children); *see also Rochin v. California*, 342 U.S. 165, 72 S.Ct. 205, 96 L.Ed. 183 (1952) (right to bodily integrity); *see also Griswold v. Connecticut*, 381 U.S. 479 (right to marital privacy); *see also Loving v. Virgina*, 388 U.S. 1, 87 S.Ct. 1817, 18 L.Ed.2d 1010 (1967) (right to marry); *see also Griswold v. Connecticut*, 381 U.S. 479; *Eisenstadt v. Baird*, 405 U.S. 438, 92 S.Ct. 1029, 31 L.Ed.2d 349 (1972) (right to use contraceptives); *see also Cruzan v. Director, Mo. Dept. of Health*, 497 U.S. 261, 110 S.Ct. 2841, 111 L.Ed.2d 224 (1990) (right to refuse unwanted lifesaving medical treatment).

and punctuation omitted); *see also Glucksberg*, 521 U.S. at 720 (cataloging the current recognized fundamental rights two decades after *Carey*). As stated in *Williams*, "although many of the Court's 'privacy' decisions have implicated sexual matters, the Court has never indicated that the mere fact that an activity is sexual and private entitles it to protection as a fundamental right." *Williams*, 378 F.3d at 1236 (citations omitted).

Nor has this Court recognized a generalized right to sexual privacy in *Griswold* or *Eisenstadt*. *See Griswold v. Connecticut*, 381 U.S. 479 (right to marital privacy); *Eisenstadt v. Baird*, 405 U.S. 438 (right to use contraceptives). Rather, as stated in *Carey*, "the teaching of *Griswold* is that the Constitution protects individual decisions *in matters of childbearing* from unjustified intrusion by the State." *Carey*, 431 U.S. 678 (emphasis added). Similarly, *Eisenstadt* holds that the right to contraceptives extends to non-marital couples. *Eisenstadt v. Baird*, 405 U.S. 438. Consequently, *Griswold* and *Eisenstadt* can only be viewed as decisions bearing on an individual's right to procreation, not as a generalized right to sexual privacy.

In 2004, the petitioners in *Williams* also sought recognition of a generalized, fundamental right to sexual privacy. 378 F.3d at 1239. The Eleventh Circuit declined to recognize such a right even if it extended only to consenting adults:

> If we were to accept the invitation to recognize a right to sexual intimacy, this right would theoretically encompass such activities as prostitution, obscenity, and adult incest – even if we were to limit the right to consenting adults. *See, e.g.*, [*Paris Adult Theater I v. Slaton*, 413 U.S. 49,] 68 n. 15, 93 S.Ct. [2628,] 2641

> n. 15, [37 L.Ed.2d 446 (1973)] ("The state statute books are replete with constitutionally unchallenged laws against prostitution, suicide, voluntary self-mutilation, brutalizing 'bare fist' prize fights, and duels, although these crimes may only directly involve 'consenting adults'"). This in turn would require us to subject all infringements on such activities to strict scrutiny. *Glucksberg*, 521 U.S. at 721, 117 S.Ct. at 2268 . . . [Moreover,] individuals whose sexual gratification requires other types of material or instrumentalities – perhaps hallucinogenic substances, depictions of child pornography or bestiality, or the services of a willing prostitute – likewise would have a colorable argument that prohibitions on such activities and materials interfere with their privacy in the bedchamber.

378 F.3d at 1240, 1242 n. 12. Therefore, there is no recognized fundamental right to sexual privacy.

B. There is no right to use sexual devices.

Moreover, the right to privacy does not guarantee a fundamental right to use sexual devices, or, in the alternative, does not extend to the sale and purchase of obscene devices. *See Glucksberg*, 521 U.S. at 723 (analyzing ban on providing suicide assistance as a burden on the right to receive suicide assistance); *Carey*, 431 U.S. at 688 (analyzing statute prohibiting sale of contraceptives as a burden on the use of contraceptives). The asserted right to use sexual devices is not deeply rooted in the Nation's history and tradition, nor is it implicit in the concept of ordered liberty and justice. *See Glucksberg*, 521 U.S. at 721 (setting forth fundamental-rights

analysis test).[2] Specifically, "there is no reference to such a right in the usual repositories of our freedoms, such as federal and state constitutional provisions, constitutional doctrines, statutory provisions, common-law doctrines, and the like." *See Williams*, 378 F.3d at 1244. To be entitled to protection, the right to use sexual devices must be based on evidence of a history and tradition of *affirmative* protection of the right. *Id.*

To the contrary, sexual devices have traditionally been treated in the context of proscription, not protection. *Id.* at 1245; *see* Geoffrey P. Miller, *Law, Self-Pollution, and the Management of Social Anxiety*, 7 Mich. J. Gender & L. 221 (2001) (discussing the history and traditional proscription of masturbation). From the eighteenth century until the second half of the twentieth century, physicians, along with theologians and concerned parents, discouraged masturbation. *See* Rachel P. Maines, *The Technology of Orgasm: "Hysteria," the Vibrator and Women's Sexual Satisfaction* 56 (1999). Further, as early as the late 1800s, the federal government criminalized articles used for immoral and indecent purposes. *See Bolger v. Youngs Drug Prods. Corp.*,

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[2] Indeed, the "utmost care" must be utilized when analyzing an asserted right and rarely will this Court extend constitutional status to such rights; thus, this Court has only recognized few rights as fundamental. *See Glucksberg*, 521 U.S. at 720-21 (cataloging the short list of recognized fundamental rights). When seeking recognition of a right neither mentioned in the Constitution nor encompassed within the reach of the Court's existing fundamental-rights precedents, it must be determined whether the carefully described asserted right is "deeply rooted in this Nation's history and tradition, and implicit in the concept of ordered liberty, such that neither liberty nor justice would exist if they were sacrificed." *Id.*

463 U.S. 60, 70, 103 S.Ct. 2875, 77 L.Ed.2d 469 (1983) (quoting Comstock Act of March 3, 1873, ch. 258, § 2, 17 Stat. 599 (1873)). In addition, the federal government first proscribed the transportation of obscene devices beginning in 1909. *See United States v. Gentile*, 211 F. Supp. 383, 386 (D. Md. 1962) (quoting revised 18 U.S.C. §§ 1462(a) & (c)).

Similarly, state legislatures acted as early as 1879 to criminalize obscene devices. For instance, Massachusetts declared it a crime to sell, lend, give away, or exhibit an "instrument or other article intended to be used for self-abuse." *See Commonwealth of Massachusetts v. Corbett*, 29 N.E.2d 151, 152 (Mass. 1940) (quoting G.L. (Ter. Ed.) c. 272, § 21). Likewise, New York proscribed the promotion of an artificial penis. *See People v. Clark*, 304 N.Y.S. 2d 326 (N.Y. City Crim. Ct. 1969) (affirming conviction for selling artificial sexual devices in violation of state statute). In addition, seven states other than Texas have enacted laws banning the sale, distribution, or promotion of sexual devices: Alabama, Colorado, Georgia, Kansas, Louisiana, Mississippi, and Virginia.[3] Thus, there is no history and tradition of

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[3] *See* ALA. CODE § 13A-12-200.2(a)(1) (Supp. 2003); COLO. REV. STAT. § 18-7-101, 102 (Cum. Supp. 1995); GA. CODE ANN. § 16-12-80 (1996); KAN. STAT. ANN. § 21-4301 (Supp. 2006); LA. REV. STAT. ANN. § 14:1206.1 (West 2001); MISS. CODE ANN. § 97-29-105 (1983); VA. CODE ANN. § 18.2-374 (Michie 1975). To the extent that other states have not enacted laws criminalizing the sale of obscene devices, it cannot be concluded that such legislative silence elevates the use of such devices to a constitutionally protected right. At most, such silence signifies either ignorance or ambivalence of the subject, or that precious legislative resources were demanded elsewhere. As such, there is no positive legal tradition regarding the protective use of sexual devices, and thus no fundamental right to use sexual devices.

affirmative protection of a right to use sexual devices. Consequently, because the right to use sexual devices is not deeply rooted in the Nation's history and tradition, nor is it implicit in the concept of ordered liberty and justice, the right to privacy does not guarantee a fundamental right to use sexual devices.

C. There is no right to access obscene sexual devices.

Further, there is no right of access to sexual devices. Under the federal constitution, the right to privacy prohibits the government from criminalizing the possession of obscene materials by a person in his or her home. *Stanley v. Georgia*, 394 U.S. 557, 564-65, 89 S.Ct. 1243, 22 L.Ed.2d 542 (1969). But the right to private possession does not prevent the government from controlling obscene material in commerce. *United States v. 12 200-Ft. Reels of Super 8mm. Film*, 413 U.S. 123, 128, 93 S.Ct. 2665, 37 L.Ed.2d 500 (1973); *United State v. Reidel*, 402 U.S. 351, 354, 91 S.Ct. 1410, 28 L.Ed.2d 813 (1971). In other words, because no correlative right to receive, transport, or distribute obscene material exists, the states may constitutionally proscribe the sale or commercial exhibition of obscene material. *See Yorko v. State of Texas*, 690 S.W.2d 260, 264 (Tex. Crim. App. 1985); *see also 12 200-Ft. Reels of Super 8mm. Film*, 413 U.S. 123; *Orito*, 413 U.S. 139, 143, 93 S.Ct. 2674, 37 L.Ed.2d 513 (1973); *Reidel*, 402 U.S. 351; *Kaplan v. California*, 413 U.S. 115, 120, 93 S.Ct. 2680, 37 L.Ed.2d 492 (1973); *Paris Adult Theater I*, 413 U.S. at 65-67; *United States v. Thirty-Seven Photographs*, 402 U.S. 363, 376, 91 S.Ct. 1400, 28 L.Ed.2d 822 (1971).

Outside the home area protected by *Stanley*, there is no zone of constitutionally protected privacy for obscene materials. *United States v. Orito*, 413 U.S. 139; *Paris Adult*

Theater I v. Slaton, 413 U.S. 49. As such, there is no right to access obscene material. *PHE, Inc. v. State of Mississippi*, 877 So.2d 1244, 1248 (Miss. 2004); *State of Louisiana v. Brennan*, 772 So.2d 64, 72 (2000); *Yorko*, 690 S.W.2d at 265. "To allow such a claim would not be unlike compelling the Government to permit importation of prohibited or controlled drugs for private consumption as long as such drugs are not for public distribution or sale." *Brennan*, 772 So.2d at 72. Indeed, this Court has never held that the right to privacy extends outside the home. *See Orito*, 413 U.S. 139; *Paris Adult Theater I*, 413 U.S. 49.

Moreover, a correlative right to distribute obscene devices has been explicitly rejected by several jurisdictions. *See People v. Wiener*, 29 Cal. App. 4th 1300, 1306, 35 Cal. Rptr. 2d 321, 325 (Cal. Ct. App. 1995); *State of Minnesota v. Davidson*, 481 N.W.2d 51 (Minn. 1992); *Stall v. Long*, 570 So.2d 257 (Fla. 1990), *cert. denied sub nom. Florida v. Long*, 501 U.S. 1250, 111 S. Ct. 2888, 115 L.Ed.2d 1054 (1991); *T.K. Video Inc., v. State of Texas*, 891 S.W.2d 287, 289 (Tex. App. – Fort Worth, 1995). As stated in *People v. Wiener*, there is no legally protected privacy interest in the distribution of obscene material and there can be no reasonable expectation of privacy in circumstances involving the distribution of obscene material. *People v. Wiener*, 29 Cal. App. 4th at 1307. Neither buyer nor seller has a privacy right at the point of sale. *Davidson*, 481 N.W.2d at 58; *Long*, 570 So.2d at 260.

In short, the right to privacy is not meant to protect those who deal commercially in obscenity. *Long*, 570 So.2d at 259. This Court has never extended *Stanley* to sellers and distributors of obscene materials. *Id.*; *Yorko*, 690 S.W.2d at 266. Rather, the Court has consistently confined the privacy right to one's home and affirmed the "deterrence of the sale

of obscene materials [as] a legitimate end of state anti-obscenity laws." *Fort Wayne Brooks, Inc. v. Indiana*, 489 U.S. 46, 109 S.Ct. 916, 103 L.Ed.2d 34 (1989). Thus, even if individuals possess a privacy right to own obscene devices in the privacy of their home, they do not have a corresponding privacy right to purchase the sexual devices. *Id.*; *T.K. Video Inc.*, 891 S.W.2d at 289; *Bonner v. State of Texas*, No. C14-93-00375-CR, 1995 WL 144347, *1 (Tex. App. - Houston [14th Dist.] Mar. 30, 1995, no pet.) (not designated for publication); *Regalado v. State of Texas*, 872 S.W.2d 7, 10 (Tex. App. - Houston [14th Dist.] 1994, writ ref'd), *cert. denied*, 513 U.S. 871, 115 S.Ct. 194, 130 L.Ed.2d 126 (1994).

In this case, Texas Penal Code § 43.23(c)(1) criminalizes the promotion of obscene devices. *See* TEX. PENAL CODE ANN. § 43.23(c)(1). It does not criminalize the possession or use of such devices in the privacy of the home. *Id.*; *Yorko*, 690 S.W.2d at 263. Consequently, because the right to privacy, as guaranteed by the Due Process Clause of the Fourteenth Amendment or Article I, § 19 of the Texas Constitution, does not include a fundamental right to sexual privacy, the right to use a sexual device, or a right to purchase a sexual device, and because the state may lawfully regulate such obscene devices in commerce, the law concerning the same is well-settled, and therefore, the petitioner's petition for writ of certiorari should be denied.

III. Because this Court's recent decision in *Lawrence v. Texas*, 539 U.S. 558, 123 S.Ct. 2472, 156 L.Ed.2d 508 (2003), did not find a fundamental right to privacy, to sexual privacy, or to use sexual devices or obtain access thereto, nor did the case extend the general right to privacy to commercial obscenity transactions outside of the home, *Lawrence* does not justify an examination of the states' anti-dildo statutes as the petitioner suggests; thus, the petitioner's petition for writ of certiorari should be denied.

In 2003, the petitioners in *Lawrence v. Texas* expressly invited this Court to decide whether there is a fundamental right to sexual privacy. *See Lawrence v. Texas*, 539 U.S. 558, 123 S.Ct. 2472, 156 L.Ed.2d 508 (2003); Tr. Of Oral Argument, No. 02-102, at 84; Br. of the ACLU et al. as *Amici Curiae*, No. 02-102, at *11-25. However, this Court declined the invitation. *See Lofton v. Sec. of the Dept. of Children and Family Servs.*, 358 F.3d 804, 815-816 (11th Cir. 2004) (noting that the *Lawrence* Court failed to apply fundamental-rights analysis, and, instead of utilizing a strict-scrutiny analysis, the Court used rational-basis review to strike down Texas's homosexual sodomy law). Indeed, this Court did not utilize the specific, established method it had previously created for determining whether a substantive due process claim implicated a fundamental right. *See Glucksberg*, 521 U.S. at 720-21 (noting the two-prong test for determining whether a fundamental right is implicated, namely, whether the alleged right is deeply rooted in the Nation's history, and if so, how the right may be carefully described). Nor did it apply the strict-scrutiny analysis in reviewing the sodomy statute at issue. *See Lawrence*, 539 U.S. at 586 (Scalia, J., dissenting) (stating that "[the majority does not] subject the Texas law to the standard of review that

would be appropriate (strict scrutiny) if homosexual conduct were a 'fundamental right,'" and concluding that the majority "proceeded to apply an unheard-of form of rational-basis review"). Rather, this Court simply held that substantive due process does not permit a state to impose criminal prohibition on private, consensual homosexual conduct. *See Lawrence*, 539 U.S. at 578.

Nevertheless, the petitioner alleges that *Lawrence* has extended the liberties guaranteed by substantive due process out of the bedroom and into the public sphere of commercial transactions. In other words, he interprets *Lawrence* as suggesting that all choices made by consenting adults regarding their sexual practices, such as the purchase of dildos, are a matter of personal liberty outside the state's control. However, such a broad reading is inapposite.

Indeed, this Court's opinion placed special emphasis on the private nature of the conduct and setting at issue in *Lawrence*. Justice Kennedy, writing for the majority, stated that the "beginning point" for the analysis of the substantive reach of liberty under the Due Process Clause was *Griswold*, which "described the protected interest as a right to privacy and placed emphasis on the marriage relation *and the protected space of the marriage bedroom.*" *Lawrence*, 539 U.S. at 564 (emphasis added). Justice Kennedy noted that later decisions of the Court extended the reasoning of *Griswold* to protect the rights of unmarried adults. *Id.* at 565-66, *citing Eisenstadt*, 405 U.S. 438 (striking down law prohibiting distribution of contraceptives to unmarried persons); *Roe v. Wade*, 410 U.S. 113, 93 S.Ct. 705, 35 L.Ed.2d 147 (1973) (striking down law prohibiting abortion); and *Carey*, 431 U.S. 678 (striking down law prohibiting sale or distribution of contraceptives to persons under sixteen years of age).

Justice Kennedy then criticized the *Bowers*[4] decision for describing the issue to be "whether there is a fundamental right to engage in consensual sodomy." *Lawrence*, 539 U.S. at 567. Instead, *Lawrence* emphasized that the case implicated "the most private human conduct, sexual behavior," occurring in "the most private of places, the home." *Id.* The issue was even framed by this Court as "[w]hether Petitioners' criminal convictions for adult consensual sexual intimacy *in the home* violate their vital interests in liberty and privacy protected by the Due Process Clause of the Fourteenth Amendment." *Id.* at 564 (emphasis added).

Nevertheless, Justice Kennedy noted that the reasoning of *Lawrence* was not limited to sexual activity within the home, stating that "there are other spheres of our lives and existence, outside the home, where the State should not be a dominant presence." *Id.* at 562. But although *Lawrence* rejected the idea that such liberty was specifically placed within the home, it emphasized the private nature of the conduct, noting that "[t]he petitioners are entitled to respect for their private lives. The State cannot demean their existence or control their destiny by making their private sexual conduct a crime." *Id.* at 578.

However, this Court only expanded constitutional protection to other private settings "required to safeguard the right to intimacy involved." *Paris Adult Theater I*, 413 U.S. at 67 n. 13. In *Paris*, Justice Kennedy observed that "the constitutionally protected privacy of family, marriage, motherhood, procreation, and child rearing is not just

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[4] *Bowers v. Hardwick*, 478 U.S. 186, 106 S.Ct. 2841, 92 L.Ed.2d 140 (1986).

concerned with a particular place, but with a protected intimate relationship." *Id.* *Lawrence* reflected this focus on protecting relationships from governmental intrusion. While declining to set exact boundaries of the term "relationship," this Court stated:

> It suffices for us to acknowledge that adults may choose to enter upon this relationship in the confines of their homes and their own private lives and still retain their dignity as free persons. When sexuality finds overt expression in intimate conduct with another person, the conduct can be but one element in a personal bond that is more enduring. The liberty protected by the Constitution allows homosexual persons the right to make this choice.

Lawrence, 539 U.S. at 567.

But the statute at issue does not criminalize a particular relationship or the use of dildos by consenting adults in the privacy of the home. And *Lawrence* does not hold that government cannot regulate *any* consensual sexual activity between adults. *Id.* at 578. Indeed, this Court specifically excluded from its analysis "public conduct or prostitution."[5] *Id.* at 560. As such, the Seventh Circuit recently determined

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[5] Specifically, the Court stated: "The present case does not involve minors. It does not involve persons who might be injured or coerced or who are situated in relationships where consent might not be easily refused. It does not involve public conduct or prostitution. It does not involve whether the government must give formal recognition to any relationship that homosexual persons seek to enter. The case does involve two adults who, with full and mutual consent from each other, engaged in sexual practices common to a homosexual lifestyle." *Id.*

that the protections of *Lawrence* did not announce a fundamental right, free from government regulation, to engage in consensual incest. *See Muth v. Frank*, 412 F.3d 808, 817 (7th Cir. 2005), *cert. denied*, ---U.S.---, 126 S.Ct. 575, 163 L.Ed.2d 480 (2005). And more specifically to this case, the Third and Fifth Circuits recently overturned district courts' rulings that the federal statutes regulating the distribution of obscenity were unconstitutional under *Lawrence*. *See United States v. Coil*, 442 F.3d 912 (5th Cir. 2006); *United States v. Extreme Assocs., Inc.*, 431 F.3d 150 (3rd Cir. 2005), *cert. denied,* --- U.S. ---, 126 S.Ct. 2048, 164 L.Ed.2d 806 (2006). Further, in a remarkably similar factual situation to the one at hand, the Eleventh Circuit concluded that *Lawrence* did not extend the constitutional privacy right to the commercial distribution of sexual devices. *See Williams*, 378 F.3d at 1239 n. 8 ("There is nothing 'private' or 'consensual' about the advertising and sale of a dildo."). It is worth noting that this Court denied petitions for writs of certiorari in *Muth*, *Extreme Assocs.*, and *Williams* implying that the appellate circuits' reasoning were sound. In other words, *Stanley's* proposition that obscenity is limited to the home and that the state may regulate obscenity in commerce still stands. *Stanley*, 394 U.S. 557.

Therefore, because *Lawrence* did not find a fundamental right to privacy, to sexual privacy, or to use sexual devices or obtain access thereto, nor did the case prohibit the state from regulating obscenity outside of the home, and because *Lawrence* was limited to private, noncommercial activity, the case does not justify an examination of the states' anti-dildo statutes as the petitioner suggests; thus, the petitioner's petition for writ of certiorari should be denied.

IV. Contrary to the anti-dildo statutes in Colorado, Kansas, and Louisiana, which were invalidated for failure to provide an exception for medical treatment purposes, the Alabama, Georgia, Mississippi, and Texas anti-dildo statutes withstood constitutional attacks because they provided an exception for medical treatment purposes. Therefore, there is not a split among the states concerning the validity of anti-dildo statutes, and consequently, the petitioner's petition for writ of certiorari should be denied.

The petitioner asserts that there is a split among the states concerning the validity of anti-dildo statutes. *See Brennan*, 772 So.2d 64; *State of Kansas v. Hughes*, 792 P.2d 1023 (1990); *People of Colorado v. Seven Thirty-Five East Colfax, Inc.*, 697 P.2d 348 (Colo. 1985) (invalidating dildo statutes); *see also Williams*, 378 F.3d 1232; *PHE, Inc.*, 877 So.2d 1244, *Yorko*, 690 S.W.2d 260; *Sewell v. State of Georgia*, 233 S.E.2d 187 (1977), *cert. denied*, 435 U.S. 982, 96 S.Ct. 1635, 56 L.Ed.2d 76 (1978) (upholding anti-dildo statutes). But a close examination of the case law reveals no splits among the states on the perceived issue.

In essence, Colorado, Kansas, and Louisiana held that restrictions on the sale of sexual devices were overbroad because they failed to provide an exemption for medical-treatment purposes. *Brennan*, 772 So.2d at 75-76, *Hughes*, 792 P.3d at 1030; *Seven Thirty-Five*, 697 P.2d at 370. But the statutes in Alabama, Georgia, Mississippi, and Texas currently provide such an exception. *See* ALA. CODE § 13A-12-200.4 (Supp. 2003) (exempting sales of sexual devices for a bona fide medical purpose); GA. CODE ANN. § 16-12-80(e)(2) (1996) (providing for an affirmative defense to those in possession of dildo prescriptions); MISS. CODE ANN. § 97-

29-107(1)(b) (1983) (allowing physicians and psychologists to prescribe sexual devices to their patients); TEX. PENAL CODE ANN. § 43.23(g) (providing it is affirmative defense to prosecution under the obscenity statute if the person that promotes the dildo does so for a bona fide medical or psychiatric reason). Accordingly, there is not a split among the states concerning the validity of anti-dildo statutes, and therefore, the petitioner's petition for writ of certiorari should be denied.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be denied in all respects.

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